IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 410 of 1995

with

CRIMINAL APPEALS Nos.410 to 430 of 1995

with

CRIMINAL APPEAL No 455 of 1995

and

CRIMINAL APPEAL NO.456 OF 1995

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?-No.

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2. To be referred to the Reporter or not?-No.

3. Whether Their Lordships wish to see the fair copy of the judgement?-No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No.

5. Whether it is to be circulated to the Civil Judge?-No.

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SHRI S.A.BOHRA

Versus

Messrs.KRISHNA CONSTRUCTION CO.,

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Appearance:

Shri BB NAIK, Standing Counsel for the Union of India,

for the appellant (original complainant).

Shri KA PUJ for Respondents Nos. 1 and 3 (Original accsused Nos.1 and 3).

Shri S.R. Divetia, Additional Public Prosecutor, for respondent No.4-State.

Respondent No.2 accused, being dead in the course of trial, the appeal against him is not competent.

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CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 09/01/97

ORAL JUDGEMENT

All these appeals are directed against the common judgment and order of acquittal passed by the learned Chief Judicial Magistrate at Mehsana on 25th February, 1994 in Criminal Cases Nos. 998 of 1990 to 1003 of 1990 and 5343 of 1990 to 5359 of 1990. Thereby, the learned trial Magistrate acquitted respondents-accused Nos. 1 to 3 of the offences punishable under Section 276-B read with Section 278-B of the Income Tax Act, 1961 (the Act, for brief).

The facts giving rise to these appeals move in a narrow compass. Respondent No.1 was a partnership firm at the relevant time and it obtained a contract from the Gujarat Housing Board (the Board for convenience) sometime in 1983 for construction of houses for the Board. Respondents Nos. 2 and 3 were its partners at the relevant time. Respondents Nos. 1 to 3 herein entrusted the work of constructing houses to three firms by the names of Messrs. Uma Construction Company, Messrs. Jitendra Construction Company and Messrs. Bhagwati Construction Company. They were practically Sub Contractors of respondents Nos. 1 to 3 herein. The latter did not deduct at source the amount of tax from the amount payable to the sub contractors as required under Section 194-C of the Act. The default of non-deduction of tax continued for four assessment years from 1985-86 to 1988-89. The penalty proceedings under Section 201 read with Section 221 of the Act were initiated against respondent No.1 herein for the assessment year 1986-87. The Income Tax Officer imposed some penalty for such default, but in appeal at the instance of the defaulter the penalty proceedings were quashed. Thereafter, the necessary sanction for

prosecution was obtained from the Commissioner of Income Tax and several complaints came to be filed in the Court of the Chief Judicial Magistrate at Mehsana, charging respondents Nos. 1 to 3 herein with the offences punishable under Section 276-B read with Section 278-B of the Act. It is needless to say that separate complaints were filed with respect to separate transactions of payment of due amount to sub contractors and for separate assessment years. It appears that in all 23 separate complaints came to be filed. They came to be registered as Criminal Cases Nos. 998 of 1990 to 1003 of 1990 and 5343 of 1990 to 5359 of 1990. The charge against the respondents Nos. 1 to 3 herein as the accused was framed. No accused pleaded guilty to the charge. They were thereupon tried.

It appears that, in the course of trial, original accused No.2 breathed his last and in his impugned judgment the learned trial Magistrate has observed that the case against him stood abated. After recording the prosecution evidence and after recording the further statement of original accused No.3 and after hearing arguments, by his common judgment and order passed on 25th February, 1994 in the aforesaid Criminal Cases, the learned Chief Judicial Magistrate acquitted the original accused of the offences punishable under Section 276-B read with Section 278-B of the Act. That aggrieved the original complainant. He has, therefore, preferred all these appeals after obtaining leave of this Court under Section 378 of the Code of Criminal Procedure, 1973 (the Code for brief) for questioning the correctness of the aforesaid judgment and order passed by the learned trial Magistrate.

Learned Standing Counsel for the Union of India Shri Naik for the appellant has taken me through the entire evidence on record in support of his submission that the view taken by the learned trial Magistrate is erroneous and unsustainable in law and that the learned trial Magistrate ought to have come to the conclusion that the guilt against the original accused was established beyond any reasonable doubt. Learned Additional Public Prosecutor Shri Divetia has supported the appellant for the purpose of all these appeals. Learned Advocate Shri Puj for the original accused has, however, submitted that the learned trial Magistrate has carefully scanned and scrutinised the evidence on record and has acquitted the original accused of the offences with which they were charged. According to learned Advocate Shri Puj for the original accused, the view taken by the learned trial Magistrate is a possible view

and it calls for no interference by this Court in these appeals in view of well-settled principles of law governing acquittal appeals. Learned Advocate Shri Puj for the original accused has further submitted that there was no valid sanction for prosecuting the accused and the impugned judgment and order of acquittal passed by the learned trial Magistrate deserves to be affirmed on this ground alone.

It may be mentioned at this stage that learned Advocate Shri Puj for the original accused has made several submissions for maintaining the judgment and order of acquittal passed by the learned trial Magistrate. He has, however, also pressed into service the contention based on invalidity of the sanction accorded for prosecuting the original accused under Section 279 of the Act. He has urged that the penalty proceedings and their quashing in appeal at the instance of respondent No. 1 herein have not been taken into consideration by the sanctioning authority before sanctioning the prosecution at least for the assessment year 1986-87. Learned Advocate Shri Puj has also submitted that the sanctioning authority has to take into consideration whether or not the case could be compounded before institution of the proceeding in view of Section 279(2) of the Act and nothing appears on the face of the sanction orders whether or not this aspect was considered by the sanctioning authority before sanctioning the prosecution in each case. Learned Advocate Shri Puj for the original accused has also submitted that it was necessary on the part of the sanctioning authority to give an opportunity of hearing to the defaulters before according his sanction for prosecution. It has also been urged by learned Advocate Shri Puj for the original accused that the reply given by and on behalf of the original accused to the notice of prosecution in each case was not considered by the sanctioning authority, and as such the sanction accorded by him for prosecution would stand vitiated. Learned Advocate Shri Puj for the original accused has cited several rulings in support of his aforesaid submissions. As against this, learned Standing Counsel for the Union of India Shri Naik has urged that the order according sanction is an administrative order pure and simple, and no opportunity of hearing has to be given to the persons, against whom a prosecution was or prosecutions were required to be launched according to law. In support of his submission, he has relied on the binding ruling of the Supreme Court in the case of State of Bihar and another v. Shri P.P. Sharma and another, AIR 1991 SC 1260. He has further urged that the validity of sanction to prosecute was not

challenged by or on behalf of the original accused in the trial court and it would be necessary to bring on record the evidence that all relevant papers were placed before the sanctioning authority for granting sanction to prosecute the original accused in each case. Learned Standing Counsel for the Union of India Shri Naik has further urged that, if the validity of the sanction granted in each case was called in question before the trial court, the complainant could have brought on record the relevant material to show that all relevant papers, including the penalty proceedings, were placed before the sanctioning authority and the sanction to prosecute in each case was granted after taking into consideration all the relevant material. He has further urged that whether or not to compound the offence before institution of the prosecution was in the sole discretion of the sanctioning authority and it was not necessary for him to record reasons in the sanction order why he did not choose to compound the offence. Learned Standing Counsel for the Union of India Shri Naik has further urged that the power to compound the offence conferred on the sanctioning authority under Section 279(2) of the Act is an independent power and the sanction to prosecute can be accorded without considering the question whether or not the offence can be compounded. In any case, runs the submission of the learned counsel for the Union of India, if the point in question was urged before the learned trial Magistrate at any stage of the trial, the complainant would have brought on record the material to show that the sanctioning authority did apply his mind whether or not the offence could be compounded before institution of the prosecution. It has been further urged that the learned Advocate for the original accused need not be permitted to take the complainant by surprise by urging this new plea at the appellate stage.

It cannot be gainsaid that the sanction to prosecute goes to the root of the matter. The law on the subject is very clear. The sanctioning authority has to apply his mind to all relevant material before granting sanction to prosecute for an offence punishable under the Act. Since the question of the validity of the sanction accorded in each case was not canvassed before the trial court at any stage, the grievance voiced by the learned Standing Counsel for the Union of India to the effect that the original complainant had no opportunity to produce the relevant material on record in that regard is found justified. Since this point has been raised for the first time at the appellate stage, I think that it would be in the interests of justice to give an opportunity to the original complainant to bring on

record the relevant material to show that a valid sanction to prosecute came to be granted in each case.

It is not necessary for me to decide at this stage whether or not an opportunity of hearing has to be given before grant of sanction to prosecute in view of the relevant provisions contained in Section 279 of the Act. I may only observe at this stage that Section 279 of the Act is not in pari materia with Section 197 of the Code. One important feature occurring in Section 279 of the Code is the provision for compounding the offence, inter alia, before institution of the prosecution made in sub-section (2) thereof. This distinguishing feature does not figure in Section 197 of the Code. It would be open to the parties to focus the attention of the learned trial Magistrate on this aspect of the case and the parties will be permitted to cite rulings on the point in support of their respective contentions on the point. Similarly, the parties would be at liberty to canvass all points which have been canvassed at the stage of trial as I am not deciding these appeals on merits.

In view of my aforesaid discussion, I am of the opinion that all these matters will have to be remanded to the trial court for the purpose of permitting the original complainant to bring on record the relevant material regarding consideration of all relevant papers by the sanctioning authority for granting the sanction to prosecute in each case. It would be open to the original complainant to bring on record the material, if any, regarding the consideration made by the sanctioning authority whether or not the offence could be compounded before institution of the prosecution. It would be open to the parties to canvass before the trial court whether or not an opportunity of hearing deserves to be granted to the affected person before according sanction to prosecute. The impugned judgment and order of acquittal passed by the learned trial Magistrate has to be quashed and set aside for the purpose.

In the result, all these appeals are accepted. The common judgment and order of acquittal passed by the learned Chief Judicial Magistrate at Mehsana on 24th February, 1994 in Criminal Cases Nos. 998 of 1990 to 1003 of 1990 and 5343 of 1990 and 5359 of 1990 is quashed and set aside. The matters are remanded to the learned Chief Judicial Magistrate at Mehsana for restoration of the cases to file and for their fresh disposal according to law in the light of this judgment of mine.

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(apj)